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SUPREME COURT, U.S.
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No. 87-1032

In The

Supreme Court of the United States

October Term, 1987

THE STATE OF TEXAS,

Petitioner,

vs.

JAMES EDWARD LONG,

Respondent.

On Petition For Writ of Certiorari To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether there exists an independent State of Texas basis for conviction which renders Federal Review moot.

II. Whether the Supreme Court has pre-empted State discussion of the right to confrontation.

II. Whether the Texas Constitutional right to confrontation accrues solely from the Federal Constitutional right to confrontation.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James Edward Long, Respondent herein, by and through his attorney, Bruce Anton, and files this Respondent's Brief in Opposition to Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, which is published at 694 S.W.2d 185 (Tex. App.—Dallas 1985, pet. granted), is reproduced as Exhibit A to the Petition for Writ of Certiorari. The State's motion for leave to file rehearing was denied on May 6, 1987.

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JURISDICTION

The State of Texas seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend VI, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him.

TEX. CONST. Art. I § 10:

> In all criminal prosecutions the accused . . . shall be confronted by the witnesses against him. . .

TEX.CODE CRIM. PROC. ANN. Art. 38.071(2):

> Sec. 2(a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:
>
> (1) no attorney for either party was present when the statement was made;

(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) the child is available to testify.

(b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

———o———

STATEMENT OF THE CASE

The Appellant, James Long, was indicted for aggravated sexual abuse of a child. A jury was empanelled on his plea of not guilty, and evidence as set out hereinafter was adduced.

In the jury's presence, a tape recording made of an interview between the complainant and a Rape Crisis coun-

selor was played (R.III-92-113). On the tape, which was made within a week of trial (R.III-51), the complainant related the Appellant had "sucked" her vagina at age 5½ (R.III-99). He later put his finger in her vagina (R.III-100). On other occasions, he put his penis in her "behind" (R.III-103-104). All in all, the Appellant had engaged in sexual contact with her from seven times a day to twice a day every day he lived with her (R.III-109). The offenses occurred in Grand Prairie (R.III-10) just before she moved to Irving (R.III-100). At trial, the complainant was age 12 (R.III-82).

The complainant's mother, Deborah Polly, testified she moved to Irving in 1981 (R.III-127). Before that she lived in Grand Prairie with the Appellant as husband and wife (R.III-129). In April of 1981, the complainant made an outcry to her, "Daddy's been fucking me," (R.III-131). She confronted the Appellant with the allegation, and he denied it (R.III-133). A report was made to the Grand Prairie police (R.III-134). At some point the Appellant indicated to Polly that he would avoid arrest (R.III-142).

Dallas Sheriff's deputy Franks (R.III-219) testified that he attempted to serve an arrest warrant on the Appellant, but the Appellant avoided service by using an alias (R.III-222).

Vickie Stoffal of Pre-Trial release also testified that the Appellant attempted to post a bond under the name Danny Pugh (R.III-227-8). She confronted him with the name James Long, but Appellant denied that name (R.III-229).

Deputy Sheriff Tinsley (R.III-236) testified that he arrested Appellant at Pre-Trial release. Again Appellant denied he was James Long (R.III-238).

The Appellant testified in his defense and denied any sexual contact with the complainant. He also explained that he used the name Danny Pugh because he had lost his license under the name James Long and needed a license to work (R.III-251). He further denied ever intending to avoid arrest on the instant charges (R.III-265). The Appellant also testified that he and the complainant's mother had dated since the incident (R.III-269). The Appellant's wife corroborated Appellant's continuing relationship with the complainant's mother (R.III-327-8).

In rebuttal, the complainant was finally called to testify by the State. She merely reiterated what was said during the video tape.

The Appellant then testified that he told complainant's mother to have the complainant examined by a doctor in order to have any charges of abuse confirmed, but no examination was done (R.III-360).

Thereupon, both sides rested and closed.

At the punishment phase, the defendant and State introduced by stipulation a prior conviction for driving with license suspended, a current deferred adjudication probation for misdemeanor theft, a prior conviction for driving while intoxicated and a prior conviction for burglary. The defense offered character testimony from the Appellant's wife, minister and friend. After argument, punishment was assessed by the jury at 20 years in prison plus a

$10,000 fine. A motion for new trial was filed and overruled.

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SUMMARY OF ARGUMENT

A.

The Court of Criminal Appeals has strongly indicated its opinion rests on an independent state ground, pursuant to the teachings of *Michigan v. Long.*

B.

The petitioner's reliance on *International Long Shoreman's Assn. v. Davis,* is entirely misplaced because the right to confrontation is not subject to Federal preemption.

C.

The Court of Criminal Appeals' interpretation of the Texas Constitution is not a mere subterfuge meant to circumvent review by this court.

———o———

REASONS FOR DENYING REVIEW

A.

This case is not ripe for review by the Supreme Court. The Texas Court of Criminal Appeals, in unmistakably clear language, held that the conviction violated the provisions of the Texas Constitution to wit:

"Based on our previous observations and authorities and for the reasons stated, we find that Art. 38.071 § 2, *supra* is both facially and as it was applied to the appellant an unconstitutional deprivation of his right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution.

In addition, and independent of the above finding, we further find that Art. 38.071 § 2, *supra* is both facially and as it was applied to this appellant an unconstitutional deprivation of his state guaranteed right of confrontation under Art. I, § 10 of the Texas Constitution.[22]

We further find that Art. 38.071 § 2, *supra* is violative of the due process clause of the Fourteenth Amendment. In addition, and independent of our finding that the federal due process guarantee is offended by Art. 38.071, § 2, *supra* we find that Art. 38.071, § 2 *supra* violates the due course of law guarantee of Art. I, § 19 of the Texas Constitution (1876).[23]

[22] Our decision that Art. 38.071, § 2, *supra*, is unconstitutional under both Art. I, § 10 and Art. I, § 19 of the Texas Constitution (1876) is made after a thorough analysis of the statute, the applicable constitutional provisions, and available case law. It was also made independent of our analysis of the comparable constitutional provisions (Sixth and Fourteenth Amendments). Further, any federal cases that were cited in our analysis of the state constitution were used only for the purpose of guidance, and do not themselves compel the result that the Court has reached."

Further, the Court of Criminal Appeals opinion is bereft of any inference that its interpretation of the Texas State Constitution is inextricably intertwined with that of the United States Constitution. To suggest, as does the State of Texas, that review by the Supreme Court will

result in a withdrawal of the Court of Criminal Appeals opinion is to engage in the merest flight of fancy.

As this court noted in *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983):

> "Accordingly, when, as in this case, a state court decision *fairly* appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independent of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.
>
> If a state court chooses merely to rely on federal precedents as it would on the precedents or all other jurisdictions, then it need only make clear by a *plain statement* in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved."

Michigan v. Long, laid out a road map for state courts to follow, so that the need for review could be clearly discerned. In *Ohio v. Johnson,* 104 S.Ct. 2536, 2540 (1984) at n.7, this court re-iterated that review would be refused if the state court was *clear* in expressing its reliance upon a state law ground. The Texas Court of Criminal Appeals bent over backwards to follow that map in *Texas v. Long.* The reliance on Art. I, § 10 of the State Constitution is unmistakably clear mirroring the court's own language in *Michigan v. Long.* Further review is clearly not warranted.

B.

The petitioner's reliance on *International Long Shoreman's Association v. Davis,* 106 S.Ct. 1904 (1986) as an exception to the rule of *Michigan v. Long, supra* is entirely misplaced. The question fairly before the Supreme Court in *Davis* was whether the State could procedurally default a claim under State rules when the Federal Government had pre-empted the labor field. Pre-emption is not a doctrine applicable to the criminal law. In criminal law, the Supreme Court sets the minimum safeguards, which the states are free to supplement. Distilled to its most rudimentary form, the Petitioner's argument is that the Supreme Court has pre-empted all inquiry into the right of confrontation—certainly a novel theory of constitutional interpretation.

C.

The Petitioner's argument that Court of Criminal Appeals of the State of Texas merely "apes" the opinions of the United States Supreme Court, was written in complete disregard of the *Long* opinion.

Section V of the *Long* opinion delineates the distinction between the Constitutions. The sentence on page 48 of the Petition for Certiorari that "The Court does not do so (impose a stricter standard under the Texas Constitution) in *Long*" is a blatant misstatement of the Court of Criminal Appeals holding and is an unworthy effort to mislead this Court.

The language of Section V, plain and unambiguous, need not be repeated here. The Court of Criminal Appeals clearly holds, *inter alia* that, in this instance, the

Texas Constitution is violated whether or not a violation of the United States Constitution exists. A "fair" reading of *Long* indicates a strong reliance in independent state grounds. The state's interpretation of *Long* is result-oriented wishful thinking.

D.

Imprisonment and repeated responses to these frivolous appeals have rendered the Respondent an indigent. Counsel is acting in a *pro bono* capacity to answer this petition. In view of the fact that the State's Petition does not establish a *bona fide* meritorious argument, Respondent asks that all costs of this appeal be taxed against the Petitioner.

CONCLUSION

For these reasons the Respondent respectfully prays that this court refuse review of the Petition for Certiorari.

Respectfully submitted,

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